

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL
FILE

In the Matter of

Amendment of the Commission's Rules
To Permit FM Channel and Class
Modifications by Application

MM Docket No. 92-159

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**COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

I. INTRODUCTION AND SUMMARY

In these comments, the National Association of Broadcasters ("NAB")^{1/} supports several of the proposals advanced in the Commission's Notice of Proposed Rule Making ("Notice")^{2/} for co-channel and adjacent channel upgrades. This support is premised not only on the likely reduction in processing time for FM station upgrades to be achieved as a result of the proposed rule changes but also on the fact that the Commission has recognized, in this proceeding, the merit of providing station-enhancement benefits to existing broadcasters.

NAB believes that the Commission should extend the proposed one-step process only for those applications that comply with both the Commission's application criteria and the agency's

^{1/} NAB is a nonprofit, incorporated association of radio and television broadcast stations and networks. NAB serves and represents America's radio and television stations and all the major broadcast networks.

^{2/} See Notice of Proposed Rule Making in MM Docket No. 92-159, 7 FCC Rcd 4943 (1992).

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allotment standards.^{3/} Also, we concur with the Commission's proposal to apply the same "cut-off" rules adopted in its recent "conflict" rulemaking decision^{4/} to upgrade applications filed pursuant to the future "one-step" approach.

We urge the Commission to adopt, subject to the qualifications described by NAB below, a one-step upgrading process that will yield near-term benefits to existing FM broadcasters seeking to improve their service.^{5/} However, the Commission has an obligation to undertake a more fundamental review of its FM allocations policy. Such a review should also be premised on the merit of improving existing stations' facilities -- and should focus on reversing the process under which the FM spectrum has been oversaturated with stations, such that all radio broadcasters -- AM and FM -- now are finding it increasingly difficult to provide a locally responsive service, due to the economic impact of the existing Commission policy toward FM allocations.

^{3/} See Notice, supra note 2, ¶ 7.

^{4/} See Report and Order in MM Docket No. 91-348 ("Conflicts Report and Order"), 7 FCC Rcd 4917 (1992).

^{5/} NAB also notes that the Commission proposes to extend these one-step benefits to applicants seeking station "downgrades." We do not object to the Commission's extending the scope of the one-step process to downgrade applications.

II. ADOPTION OF THE COMMISSION'S PROPOSALS, WITHIN APPROPRIATE LIMITS, WILL SERVE THE PUBLIC INTEREST

As a representative of existing FM broadcasters, among other broadcast licensees and permittees, NAB frequently has been apprised, by our FM members, of the often inordinate delays and uncertainties attached to facility upgrading efforts. Over the years we have supported Commission proposals to refine and expedite the upgrading process and make it more equitable for existing licensees.^{6/} The FCC's proposals in this proceeding are aimed at extending these policies through the consolidation of two distinct Commission processes into one. So long as important safeguards -- largely focussing on interference protection and equity matters -- are continued, NAB offers its support.

In order to preserve these safeguards, NAB urges the Commission to offer this new one-step process only to co-channel and adjacent-channel upgrades and only to situations where the applicant would comply with the Commission's application and allotment criteria. Specifically, NAB recommends that the one-step process not be provided for applicants failing to meet the Commission's minimum distance separations requirements and city grade standards.^{7/} By adopting these limitations, the Commission would disallow one-step applicants' use of "contour

^{6/} See, e.g., Comments of NAB in MM Docket No. 83-1148, filed January 16, 1984; see also Comments of NAB in MM Docket No. 85-313, filed December 2, 1985.

^{7/} See Notice, supra note 2, ¶ 7.

protection" or reliance on only "substantial compliance" at the site selected. NAB has been a long-standing critic of the "contour protection" and "FM directional antenna" concepts^{8/} -- concepts aimed at the shoe-horning in FM radio stations with diminished regard for interference protection and the integrity of the FM band.

NAB also concurs with the FCC's proposal to offer the one-step process only to modifications that will require no changes to the Table of Allotments other than a change in the allotment of the station seeking the modification.^{9/} We share the Commission's view that matters of equity and sound communications policy demand that modifications affecting third parties should be examined and governed by the full allotment rulemaking process.

Finally, and again on the basis that the decision in the Commission's "conflicts" rule making^{10/} properly advanced the interests of existing broadcasters seeking to improve their facilities, NAB supports the Commission's proposal^{11/} to apply the conflicts decision's "cut off" rule to applicants employing the one-step process. Such action would serve the public

^{8/} See, e.g., NAB Petition for Reconsideration in MM Docket No. 87-121, filed April 7, 1989; see also Petitioners' Statement of Consensus and Joint Supplement to Petitions for Reconsideration, filed March 11, 1990.

^{9/} See Notice, supra note 2, ¶ 8.

^{10/} See Conflicts Report and Order, supra note 4.

^{11/} See Notice, supra note 2, ¶¶ 9-11.

interest by again removing risks from existing FM licensees seeking to improve their service to the public through station modifications.

III. BEYOND ADOPTION OF THE PROPOSALS IN THIS PROCEEDING, THE COMMISSION MUST ADOPT EVEN MORE FUNDAMENTAL REFORMS TO THE FM ALLOCATIONS PROCESS

Just as NAB strongly supported the "conflicts" rulemaking goals of reducing FCC staff time and providing greater certainty for broadcast applicants and petitioners,^{12/} we believe that the Commission's proposals in the instant proceeding, subject to the qualifications endorsed by NAB herein, can also serve these interests and the interests of the listening public. However, NAB believes there are more global, fundamental issues that must be addressed on the matter of authorizing improved and new FM radio service. In addition to making the kind of policy and rule changes advanced in the above-captioned proceeding, it is NAB's view that the Commission should undertake a more comprehensive reassessment of its FM policies.

Earlier this year, NAB filed a "Request for Temporary Suspension of New Commercial FM Station Allotment and Application Processing" and a related "Petition for Rule Making," the latter urging the Commission to undertake a wide-ranging review of its FM allotment and application processing procedures and policies.

^{12/} See Consolidated Reply Comments of NAB in MM Docket Nos. 91-347 and 91-348, filed February 6, 1992.

These two NAB filings were accepted by the Commission and given file numbers RM-7932 and RM-7933, respectively.^{13/}

Based on some of the same considerations that are at the foundation of the "conflicts" proceeding and now this "one-step" proceeding, the NAB Petition for Rule Making asks the agency to revise its policies to focus on the improvement of existing stations' service, rather than continually working toward the addition of new stations to the radio marketplace -- and to individual radio markets -- already overwhelmed with destructive competition.^{14/} The Petition asks the Commission to adopt policies wherein any request for a new station or new allotment would have to be accompanied by a showing, followed by an FCC analysis, assessing whether a particular radio market has the economic activity sufficient to absorb the addition of a new station.^{15/} Moreover, and recognizing the benefits to be gained by the industry and the public, the NAB Petition recommends^{16/}

^{13/} See "Office of the Secretary, Petitions for Rule Making Filed," FCC Public Notice, Report No. 1882, released March 20, 1992.

^{14/} See NAB Petition for Rule Making (RM-7933) at 1-10 and 15-24.

^{15/} Id. at 19-21.

^{16/} Id. at 22-24.

that the Commission expand its current minority tax certificate policy^{17/} and the current "distressed sales" policy.^{18/}

Indeed, last week NAB submitted a letter to FCC Chairman Alfred C. Sikes, again urging him and his fellow Commissioners to initiate the proceedings requested in NAB's RM-7932 and RM-7933 filings. A copy of that letter is attached.

Yet another demonstration of the urgent need for Commission reform of its allocation policies is found in the Commission's Report and Order MM Docket No. 90-476.^{19/} In its Petition for Reconsideration, filed September 25, 1992, Radio South, Inc. details how a simple upgrade request for a presently licensed facility (Station WFFN, Cordova, Alabama) resulted in a Commission action that not only denied the upgrade but forced WFFN to change channels and, ironically, relocate its transmitter site farther from its community of license.

This patently unfair Commission action resulted when another petitioner requested a channel for a "community" with a population of 400 people, effectively blocking the Station WFFN upgrade and the resulting improved service to the Cordova station's city and county of license, of which WFFN is the sole "local" voice.

^{17/} See, e.g., Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC 2d 979 (1978).

^{18/} Id. See also Clarification of Distress Sale Policy, 44 R.R. 2d (P&F) 479 (1978).

^{19/} See Report and Order in MM Docket No. 90-476, 7 FCC Rcd 5489 (1992).

The Commission's present allocation policies allow the continuation of this practice of "radio chess," or juggling of channels, encouraged by the allocation of facilities to microscopic communities. Rather than strengthening existing broadcast services, these policies tend to weaken the overall financial viability of all broadcast services within a given area. Furthermore, these allocation policies simply continue the Docket 80-90^{20/} "more is always better" myth -- a myth recently denounced as a mistake by the members and staff of the Commission.^{21/}

In an effort to prevent the further erosion of the U.S. radio industry, NAB urges the Commission to give existing stations first option of upgrading and improving their service areas in all cases. Only after an existing station is at its maximum allowable class, under the Commission's present city grade and mileage separation standards, should applications be considered which otherwise would have prevented a technical improvement of that existing station. And even in these cases, NAB recommends, as urged in our above-referenced petition for rule making, that the Commission engage in a case-by-case

^{20/} See Report and Order in BC Docket No. 80-90, 94 FCC 2d 152 (1983); see also First Report and Order in MM Docket No. 84-231, 100 FCC 2d 1332 (1985).

^{21/} The Radio South Petition for Reconsideration, at 5-7, gives some examples of various Commissioners' statements regarding the need for a modification in the Commission's radio allocations policy. Also, at two panels at the NAB Radio Show last month in New Orleans, FCC Mass Media Bureau Chief Roy Stewart stated his view that "Docket 80-90 was a mistake."

assessment as to whether a radio market possesses enough economic activity to support the introduction of a new radio broadcast facility.

Again, while NAB today urges the Commission to adopt its one-step plan expeditiously, we believe that a more fundamental review of FM policy is necessary to ensure that the Commission's allotment and licensing of FM facilities meet relevant statutory standards intended to ensure effective local radio broadcast service.

IV. CONCLUSION

For the reasons stated above, NAB urges adoption of the one-step FM station upgrading proposals advanced in the Commission's Notice, subject to the limitations and safeguards we have recommended herein. However, while NAB believes that the benefits of the one-step process should be extended to existing broadcasters as soon as possible, we recommend that similar


expedition be attached to the institution and completion of a more fundamental review of the Commission's FM allocation policy.

Respectfully submitted,

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Attachment

October 5, 1992

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September 30, 1992

The Honorable Alfred C. Sikes
Chairman
Federal Communications Commission
1919 M Street, NW
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Washington, DC 20554

Re: Time for a Change in FM Allocation Policy -- A
Policy at Odds with Contemporary FCC Regulation of
Radio Broadcasting
MM Docket No. 90-283
RM-7932
RM-7933

Dear Chairman Sikes:

Earlier this month the Commission's revised radio station ownership rules became effective -- heralding a new regulatory regime aimed at improving the industry-wide health of a struggling radio industry. NAB again applauds the FCC's leadership in that proceeding and shares the Commission's expectation that station consolidation and enhanced station efficiencies will help advance the goals of public responsiveness through radio broadcast programming. But, we are writing you today about a serious defect in a related set of Commission policies -- policies that well can counteract the positive steps the FCC recently has taken.

In large part, the Commission's radio ownership actions were premised on the severe economic and financial distress of the radio industry -- phenomena brought about, in large part, by the vast number of radio stations and other competing media. This overabundance of radio station competitors -- and competition -- was documented in the agency's "Overview of the Radio Industry" staff report, issued in January, 1992, and in both the radio ownership Report and Order and the Memorandum Opinion and Order on reconsideration. The Commission's conclusions in this regard are painfully accurate. The latest NAB financial survey of radio stations has found that nearly two-thirds of all commercial radio stations lost money during 1991.

Plain and simple, the Commission's ownership rule revisions primarily were in response to the damage caused by FCC radio station allocations policies in effect over the last decade. On many occasions, various Commissioners and top FCC staff have opined that "Docket 80-90 was a mistake." NAB agrees.

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But the term "Docket 80-90" applies not only to the dropping in of nearly 700 new station allotments in 1985. The legacy of Docket 80-90 includes the entirety of the FCC's FM current allocations policy, particularly the revised interference standards which have been used to create hundreds and hundreds of additional new stations to the radio landscape. These standards recently were amended again to allow the shoe-horning in of yet more stations through the use of FM directional antennas.

Turning around the American radio industry's financial condition -- and improving its overall potential for local public service -- demands a comprehensive approach. By the ownership rule revisions the Commission has tackled one important side of the problem. But, the agency cannot ignore the fact that its current FM allocations policy acts to create the same kind of oversaturation conditions that the ownership rules were designed to help alleviate. That is, benefits ensuing from the ownership rule changes will only be diminished by FCC allocations policies that still are premised on the faulty notion that "more is always better."

For AM radio the Commission has made the right choices. The new AM allocations policy is designed not to add to the overall number of stations but to improve existing stations' technical and operational service. Through tighter interference standards, reduction of congestion through stations' migration to the expanded band and new incentives for creating fewer, not more, AM facilities, the AM medium truly will be improved. For FM, no such enlightened choices yet have been made by the Commission. Indeed, the current allocations policy still works toward the addition of more and more stations, regardless of the economic condition of the medium as a whole, let alone individual radio markets.

One prime example of the misguided -- and injurious -- nature of existing FM allocations policy is the recent FCC FM channel allotment decision for the "East End" of Long Island, New York. (See, Report and Order in MM Docket No. 90-283, released July 13, 1992.) Here the Mass Media Bureau, essentially on its own motion, dropped in four new FM allotments -- an allotment total not sought by the parties.

In the context of a channel allocation proceeding, four parties were competing for a single new channel allotment -- in a geographic area where the existing radio stations were experiencing financial distress and market oversaturation. Indeed, four additional construction permits are currently outstanding in the area and two of the existing radio facilities

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in the East End are engaged in time brokerage arrangements, reportedly as a way of keeping from going dark.

At no time during the course of the proceeding did the Commission give notice that it was considering dropping in four new channels. Nor were each of the parties to the proceeding indicating a desire to operate one of four stations that might be added to the already saturated market. But, the Commission's staff, finding that four new channels could be added technically to the general area -- then added those channels through the Report and Order. Several petitions for reconsideration and a motion for stay are currently pending in that proceeding. No one has opposed the reconsideration petitions or the stay motion.

While we've pointed to this one example, it is the entirety of the Commission's FM allocation policy that needs review. Fortunately, the Commission now has before it the vehicle for making critically-needed changes to this policy.

Earlier this year NAB filed a Petition for Rule Making (RM-7933) asking for a comprehensive review of the agency's current FM allocations policy. A companion NAB petition (RM-7932) asked for a temporary suspension of most new station allotment activity pending Commission completion of the overall policy review in a rule making. Following the FCC's March 20, 1992, placement of these petitions on FCC public notice, substantial support was voiced for the notion of reexamining the policy foundations for the Commission's FM allocations policy.

In these petitions, NAB has asked the Commission to focus its energies -- and its radio allocations policy -- on the improvement of existing broadcast facilities, enhancing their ability to provide local public service. We have urged the Commission to undertake a market economic analysis prior to adding new stations. These NAB petitions also ask the FCC to take related steps to advance minority ownership of radio broadcast facilities through, inter alia, the expansion of both the existing minority tax certificate program and the current distressed sales policy.

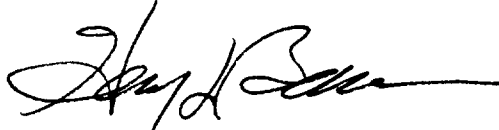
Mr. Chairman, the time for the Commission to reassess this faulty and damaging FM allocations policy is long overdue. If the FCC's goal truly is to improve the economic condition and service potential of radio, the agency must not further delay this review.

We welcome your response to this letter and hope that we can look toward the inauguration of Commission proceedings designed to complement -- not work against -- the benefits the

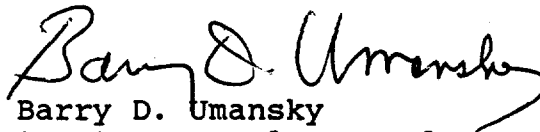
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Commission has granted the industry through its radio ownership rule revision.

Respectfully submitted,



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cc: FCC Commissioners
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Parties to MM Docket No. 90-283
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Files of RM-7932 and RM-7933